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IN THE

Supreme Court of the United States

OCTOBER TERM, 1963.

No. 550

CHEMICAL BANK NEW YORK TRUST COMPANY and MANUFACTURERS HANOVER TRUST COMPANY, formerly MANUFACTURERS TRUST COMPANY,
Petitioners,

against

ROBERT F. KENNEDY, Attorney General of the United States,
Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

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INDEX.

	PAGE
Citations to Opinions Below	2
Jurisdiction	2
Questions Presented	2
Statute Involved	3
Statement	3
Reasons for Granting the Writ	5
Law and Argument in Support of Reasons	5
I.—The Court of Appeals erroneously denied Petitioners' statutory right to review contrary to the expressed congressional intent	5
II.—To permit the Attorney General to contend that his disallowance of the claims may now be upheld upon the ground that they are against an agency of the Hungarian government, and to permit him to conclusively determine the correctness of his belated contention deprives Petitioners of their rightful claims and of Due Process of Law	8
III.—Gross injustice should be reversed	13
Conclusion	15
Appendix A—Statutes	A-1
B—Opinions and Judgments below	B-1

TABLE OF CASES.

	PAGE
Air Line Dispatchers Ass'n v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir.), *cert denied*, 342 U. S. 849 (1951)	7
Anniston Mfg. Co. v. *Davis*, 301 U. S. 337 (1937)	13
Burlington Truck Lines, Inc. v. *United States*, 371 U. S. 156 (1962)	9,10
CAB v. *Delta Air Lines*, 367 U. S. 316 (1961)	12
Estep v. *United States*, 327 U. S. 114 (1946)	7
FTC v. *American Tobacco Co.*, 264 U. S. 298 (1924)	13
Galvan v. *Press*, 347 U. S. 522 (1954)	11
Hannah v. *Larche*, 363 U. S. 420 (1960)	12
Harriman v. *ICC*, 211 U. S. 407 (1908)	13
Heikkila v. *Barber*, 345 U. S. 229 (1953)	7
Hormel v. *Helvering*, 312 U. S. 552 (1941)	10
In re Murchinson, 349 U. S. 133 (1955)	12
SEC v. *Chenery Corp.*, 332 U. S. 194 (1947)	10
Shaughnessy v. *Pedreiro*, 349 U. S. 48 (1955)	8
Texas Gas Transmission Corp. v. *Shell Oil Co.*, 363 U. S. 263 (1960)	10
United States v. *43.7 Acres of Land*, 43 F. Supp. 347 (D. Md. 1942)	11
Willner v. *Committee on Character and Fitness*, 83 S. Ct. 1175 (1963)	13

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ROBERT F. KENNEDY, Attorney General of the United States,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA.

Petitioners pray that a writ of certiorari issue to review the May 2, 1963 judgment of the United States Court of Appeals for the District of Columbia (R. 175), which reversed and remanded the December 6, 1961 judgment of the District Court (R. 169).

Citations to Opinions Below.

Judge Holtzoff's opinion, in favor of Petitioners, in the District Court, printed in the Appendix (B-1), is reported in 199 F. Supp. 256. The opinion of the Court of Appeals reversing and remanding, printed in the Appendix (B-11), is reported in F. 2d

Jurisdiction.

The judgment (R. 175) sought to be reviewed was entered May 2, 1963. Rehearing was denied July 16, 1963 (R. 196).

Jurisdiction is invoked under 28 U. S. C. 1254(1).

Questions Presented.

1. Does §208(c) of the International Claims Settlement Act of 1949, as amended, 22 U. S. C. §§1631a *et seq.*, require the Attorney General, after disallowance on the merits of a claim against a national of Hungary, to make an additional determination that the claim is not asserted against an agent or instrumentality of Hungary before the statutory right of review may be invoked?

2. Does the Court of Appeals' decision permitting the Attorney General, after his disallowances of claims have been reversed and after he has been directed to pay the claims, (a) to assert for the first time in the Court of Appeals that Petitioners' claims must be disallowed because made against an agency of Hungary, and (b) to conclusively determine without possibility of judicial review the correctness of his contention, violate Petitioners' right to Due Process of Law as guaranteed by the Fifth Amendment to the Constitution?

3. Does the decision sought to be reviewed constitute a gross miscarriage of justice?

Statute Involved.

The International Claims Settlement Act of 1949, as amended, and as further amended by Public Law 285, 84th Congress, 1st Session, approved August 9, 1955, 69 Stat. 562 *et seq.*, 22 U. S. C. §1631a *et seq.* (hereinafter called the Act), so far as at all possibly pertinent, is printed in the Appendix (A-1 *et seq.*).

Statement.

1. The facts are comprehensively summarized in the District Court's opinion (B-1) and in the record (R. 95-104, 129-134).

2. Pursuant to the Act (A-1), the Attorney General, as the President's designee thereunder (Ex. Order 10644, 20 F. R. 8363), vested in himself property as having been owned by the National Bank of Hungary (R. 53 *et seq.*), which resulted in $168,158.07 becoming available for payment on account of debt claims he might allow against said sum (R. 170).

3. On March 7 and 8, 1957, Petitioners filed debt claims with the Attorney General against the net proceeds of said vested property of the National Bank of Hungary for $684,742.98 and $159,883.04, respectively (R. 68, 78, 170), pursuant to the Act (A-4).

4. The Attorney General made a finding, December 22, 1960, "that there is no debt due and owing * * * by the National Bank of Hungary", ordered that Petitioners' claims be "dismissed and disallowed" (R. 152, 154), and issued a Final Schedule in conformity with that order (R. 157).

5. On the statutorily conferred review, the District Court, on cross-motions for summary judgment (R. 161, 158, 160), allowed the claims and ordered the available net proceeds of the vested property of the National Bank of Hungary to be paid to Petitioners on account thereof (R. 161, 170), December 6, 1961.

6. On the Attorney General's appeal (R. 171), heard January 7, 1963, the Court (Judges Danaher, Burger and Wright) May 2, 1963 reversed and remanded (R. 175), on the opinion (B-11) by Judge Burger, that:

> "* * * the Attorney General made no finding with regard to the command of Section 208(a).
>
> * * * If * * * the Attorney General had determined that the National Bank of Hungary came within the interdment of Section 208(a)(1), *i.e.*, that it was an agency or instrumentality of the Hungarian government, that determination would now be final and not subject to judicial review. In a case such as this, an administrative finding that Section 208(a)(1) *does not apply* is the necessary predicate to review of the Attorney General's determination by the District Court. Congress has commanded in unmistakable terms that this determination is to be made by the administrator of the statute and not by the courts. However, since the Attorney General has never made the finding contemplated by the statute he must be allowed to determine, at this time, whether the claims asserted are barred by Section 208(a). If they are found to be claims of that category, the Act compels the Attorney General to disallow them and that determination is binding on the courts." (Emphasis by the Court.)

7. Petition for rehearing was denied July 16, 1963 (R. 196).

Reasons for Granting the Writ.

1. To give a controlling construction of the Act and give effect to the right of review granted by the Congress.

2. To prevent a deprivation of Due Process of Law as guaranteed by the Fifth Amendment to the Constitution.

3. To reverse a gross miscarriage of justice and to do justice under the law.

Law and Argument in Support of Reasons.

I.

The Court of Appeals erroneously denied Petitioners' statutory right to review contrary to the expressed congressional intent.

The Court of Appeals held that "an administrative finding that Section 208(a)(1) (22 U. S. C. §1631g(a)(1)) *does not apply* is the necessary predicate to review of the Attorney General's determination by the District Court." This holding is patently erroneous, for the Court of Appeals' construction of the Act is contrary to the unambiguous grant of judicial review in the Act.

The right to review in this case has been expressly granted by the Congress. Section 208(f) of the Act (22 U. S. C. §1631g(f)) provides that "any claimant considering himself aggrieved may file in the District Court . . . a complaint for review. . . ." Thus the right to review accrued to Petitioners, as aggrieved claimants, unless the Congress otherwise deprived them of that right.

Section 208(a) of the Act (22 U. S. C. §1631g(a), A-3) requires the Attorney General to apply the net proceeds of vested property toward the payment of debt claims allowed by him, but provides that:

"* * * No debt claim shall be allowed under this section—

(1) if it is asserted against Bulgaria, Hungary, or Rumania (including the government or any political subdivisions, agencies, or instrumentalities thereof); or

(2) if it is based upon an obligation expressed or payable in any currency other than the currency of the United States; * * *"

Section 208(c) of the Act (22 U. S. C. §1631g (c), A-4) further provides:

"The designee [the Attorney General] shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination with respect to each claim, of allowance or disallowance, in whole or in part. The determination of the designee that a claim is within either paragraph (1) or (2) of subsection (a) of this section shall be final and shall not be subject to judicial review, and such claim shall not be considered a debt claim for any purpose under this section."

Thus, the Court of Appeals quite correctly stated that "if at the time the claim was before him, the Attorney General had determined that the National Bank of Hungary came within the intendment of Section 208(a)(1) . . . that determination would now be final and not subject to judicial review." But it does not follow that the Attorney General is required to make a finding that the claim is *not* within Section 208(a)(1) when he has made a determination of disallowance on other grounds.

The Act requires the Attorney General to examine the claims and evidence, and make a determination of allowance or disallowance. He complied with this statutory command. Several grounds are given in the statute for

disallowance, and there is no intimation that it is necessary to base the disallowance upon more than one ground. The Attorney General is not required to make a "finding" that all the statutory defenses do not apply.

The Act only provides that *if* the Attorney General had determined that the claims *are* against an agency or instrumentality of Hungary, they must be disallowed, and that such a determination would be final and not subject to review. Since this did not occur, the statutory right of review accrued. The Court of Appeals' construction of the Act is directly contrary to its unequivocal wording, and has deprived Petitioners of their right of review granted unambiguously by the Congress.

It is well established that preclusion of judicial review is not lightly to be inferred, and the legislative intent to do so must be clear. See *Estep* v. *United States*, 327 U. S. 114 (1946); *Heikkila* v. *Barber*, 345 U. S. 229 (1953); *Air Line Dispatchers Ass'n* v. *National Mediation Board*, 189 F. 2d 685 (D. C. Cir.), *cert denied*, 342 U. S. 849 (1951).

The Administrative Procedure Act, 5 U. S. C. §§1001 *et seq.*, additionally points up the error of the Court of Appeals. Section 1009 provides that a person aggrieved by agency action shall be entitled to judicial review "except so far as (1) statutes preclude judicial review or (2) agency action is by law committed to agency discretion." Under this Act, judicial review exists *except so far as* Section 208(c) (22 U. S. C. §1631g (c), A-4) has precluded it. Congress has precluded review only if the Attorney General determines that the claims "*are*" within §208(a)(1) or (2). Furthermore, §12 of the Administrative Procedure Act, 5 U. S. C. §1011 provides that no subsequent legislation shall be held to supersede or modify the requirements of the act "except to the extent that such legislation shall do so expressly."

The purpose of the Administrative Procedure Act was to remove obstacles to judicial review. *Shaughnessy* v. *Pedreiro*, 349 U. S. 48, 51 (1955). In the present case, the Court of Appeals has imposed an additional obstacle to review, contrary to the express statutory command and Congressional intent.

The Court of Appeals' holding, backed by no cited authority, and clearly contrary to statutory command and reason, is clearly erroneous and should be reversed.

II.

To permit the Attorney General to contend that his disallowance of the claims may now be upheld upon the ground that they are against an agency of the Hungarian government, and to permit him to conclusively determine the correctness of his belated contention, deprives Petitioners of their rightful claims and of Due Process of Law.

The Attorney General denied Petitioners' claims against a national of Hungary upon the merits, upon the ground that no claim was due and owing. The judgment of the District Court reversed the Attorney General's determination, and directed him to pay over to Petitioners the money due and owing. Only then, upon his appeal to the Court of Appeals, did the Attorney General contend that his disallowance of the claim might be upheld upon another ground, namely that the claim was asserted against an instrumentality of the Hungarian government. To permit the Attorney General first to make such a contention in the Court of Appeals is erroneous. But this error is compounded and transgresses the fundamental rules of fair play required by the Fifth Amendment to the Constitution if the Attorney

General is now permitted to unilaterally and conclusively decide that his own belated contention is correct.

As the Court of Appeals noted, the evidence that the National Bank of Hungary provided services and performed functions for the Hungarian government was before the Attorney General in 1960 when he disallowed Petitioners' claims on the merits (B-12-13). With this evidence before him he did not then disallow the claims upon a ground which would have conclusively determined Petitioners' rights adversely. Nor did the Attorney General contend that the claims were within the intendment of Section 208(a)(1) (22 U. S. C. §1631g(a)(1)) when Petitioners availed themselves of their statutory right of review in the District Court. Only after a reversal upon the merits of his previous determination did the Attorney General, with the zeal of appellate counsel, fasten upon another rationalization for his previous disallowance.

With all the evidence before him, the Attorney General's disallowances on the merits implicitly recognized that Petitioners' claims were asserted against a national of Hungary, and not against an agency or instrumentality of the government. It must be presumed that the Attorney General performed his duty and considered that possibility and rejected it. This conclusion follows from the fact that it is inherent in the disallowances, on the finding "that there is no debt due and owing", that he determined that the claims were *not* against Hungary, for the Act forbade him from considering them as debt claims "for any purpose", if the claims were against an agency or instrumentality of Hungary. Therefore, this Court's comments concerning the belated action of the Attorney General in this case become especially pertinent.

In *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1962), this Court pointed out that "the courts

may not accept appellate counsels' *post hoc* rationalizations for agency action". It is a simple but fundamental rule of administrative law that

> "a reviewing court, in dealing with a determination or judgment which an administrative agency alone is authorized to make, must judge the propriety of such action solely by the grounds invoked by the agency." (*SEC* v. *Chenery Corp.*, 332 U. S. 194, 196 (1947); *Burlington Truck Lines, Inc.* v. *United States*, 371 U. S. 156 (1962)).

In *Texas Gas Transmission Corp.* v. *Shell Oil Co.*, 363 U. S. 263, 270 (1960), this Court stated that "the grounds upon which an administrative order must be judged are those upon which the record discloses that its action was based." In that case this Court held that when the FPC disposed of a case solely upon application of contract principles, rather than upon other grounds within its specialized competence, the validity of the agency's action must be judged upon those principles. Making his determination upon general legal principles, the Attorney General's action must be judged on those principles.

While ordinarily an appellate court will not consider issues not raised below, the rule is not inflexible, and the courts will make an exception to prevent a plain miscarriage of justice. *Hormel* v. *Helvering*, 312 U. S. 552 (1941). But to permit the Attorney General to raise this question now is to permit justice to be miscarried. As the District Court held, the claims are due and owing from the National Bank of Hungary. Justice demands that Petitioners recover the monies owed. No exception may be countenanced which would deprive Petitioners of the justice to which they are entitled.

The Court of Appeals violated fundamental rules of law by considering the Attorney General's contention that the

claims must be disallowed upon a newly asserted ground. But to permit the Attorney General to withdraw his disallowances upon the merits, reclassify the claims, and determine without possibility of judicial review that the claims are against Hungary, shocks the sense of justice and fair play which due process requires. See *Galvan* v. *Press*, 347 U. S. 522, 530, 534 (1954). Especially is this true where, as here, (a) the claims were timely filed with the Attorney General in 1957 (R. 68, 78); (b) they were disallowed by him on the merits (R. 152, 154) December 29, 1960 (R. 158); (c) time for filing claims against Hungary with the Foreign Claims Settlement Commission expired before they were so disallowed (A. 7, 22 U. S. C. 1641e and 20 F. R. 7312); and (d) there is no provision whereby Petitioners *might* ultimately receive an insignificant ratable part of their claim through the Foreign Claims Settlement Commission, since there is no provision for these funds to become available to the creditors of Hungary, and since the Commission's affairs have been completed.

The Attorney General's belated assertion that the claims are against Hungary, coupled with the Court of Appeals remand based upon erroneous statutory construction, violates principles necessary for the fair judicial process required by the due process clause. Most appropriate is the comment of the court in *United States* v. *43.7 Acres of Land*, 43 F. Supp. 347, 352 (D. Md. 1942):

> "The judicial process, once fairly invoked, must be kept inviolate in all stages, without fear or favor. Resort to it would indeed become an empty privilege if capable of being emasculated . . . by the caprice or preference of Government officials . . . ."

In fact, permitting the Attorney General at this state of the proceedings to conclusively deprive Petitioners of their right to review would, as this Court stated of the power of

reconsideration in *CAB* v. *Delta Air Lines*, 367 U. S. 316, 328 (1961), allow his power to be used as a "lever for nullifying an express provision of the act," an unconscionable result.

There is no precedent for giving an administrative agency or executive department the power to deprive the courts of jurisdiction retroactively, which is the effect of the Court of Appeals' decision. It would certainly be wasteful judicial administration, as well as a violation of due process, to allow a trial in court when the effect of all proceedings can later be vitiated by the whim of one party. Clear statutory language should be required to give such unprecedented power to an administrative agency. To permit the Attorney General to create a jurisdictional bar after a court has ruled against him upon his own determinations is contrary to fundamental precepts of fair play and due process of law.

Furthermore, the decision of the Court of Appeals fails to assure Petitioners of a fair decision upon the question of law as to whether the claim is asserted against Hungary. "A fair trial in a fair tribunal is a basic requirement of due process." *In re Murchinson*, 349 U. S. 133, 136 (1955). Fairness of course requires an absence of actual bias. "But our system of law has always endeavored to prevent even the probability of unfairness." *Ibid.*

Administrative agencies must observe the basic precepts of due process of law.

> "[W]hen governmental agencies adjudicate or make binding determinations which directly affect the legal rights of individuals, it is imperative that those agencies use the procedures which have traditionally been associated with the judicial process" (*Hannah* v. *Larche*, 363 U. S. 420, 442 (1960)).

And the fundamental fairness required by due process extends to the concluding procedure of an administrative body, as well as to the beginning and intermediate steps. *Willner* v. *Committee on Character and Fitness*, 83 S. Ct. 1175, 1181 (1963).

The Court of Appeals' decision permits a biased and prejudiced review of the Attorney General's disallowance of the claims, for it is a foregone conclusion in light of the history of this dispute that he will now make an unreviewable determination that Petitioners' claims are against an agency of Hungary. Permitting him to conclusively determine, without possibility of judicial review, that Petitioners have no rights in the vested property, after the District Court has directed payment of the claims, deprives Petitioners of the fundamental fair play guaranteed to them by the Fifth Amendment of the Constitution.

Petitioners therefore meritoriously contend that this Court should review and reverse the construction of the Act complained of, and replace it with the construction of the Act required by its unequivocal wording. By so doing this Court will leave the Act and the proceedings in this case constitutional, and rectify what would otherwise be a deprivation of due process of law. See *Anniston Mfg. Co.* v. *Davis*, 301 U. S. 337, 351 (1937); *FTC* v. *American Tobacco Co.*, 264 U. S. 298, 307 (1924); *Harriman* v. *ICC*, 211 U. S. 407, 422 (1908).

III.

Gross Injustice Should be Reversed.

The National Bank of Hungary represented and promised to Petitioners through their representative, the Hungarian Commercial Bank of Pest (R. 164, 40), that it would

use monies to be delivered to it by the borrowers from Petitioners, Hungarian exporters, to pay loans that Petitioners would make to the exporters. The Petitioners, in sole reliance upon this promise and representation, made loans aggregating $3,735,765.00 (R. 144, 139) before the promise was repudiated (R. 37, 139, 144, 47-48). The National Bank of Hungary received the monies with which to pay the loans (R. 143, 144-45), and by reason of this receipt and the promise and representation made, became the personal debtor of Petitioners.

The liability of the government of Hungary is based upon its specific guaranty of the debts (R. 23, 75). But the liability of the National Bank of Hungary was based upon its separate undertaking (R. 163, 35-36). It is elementary law that, even if the National Bank of Hungary were an agent of the Hungarian government for some purposes when it gave the undertaking, it became personally and independently liable for the indebtedness involved which it undertook to pay, either as agent of Petitioners or as trustee for them.

As the District Court by Judge Holtzoff pointed out, 199 F. Supp. 261 (B-8):

> "Plaintiffs' claims are valid not only as a matter of law, but as a matter of morals as well."

The Court of Appeals' decision, reversing the order of the District Court which directed the Attorney General to pay over to Petitioners the monies due and owing from the National Bank of Hungary, and which permits the Attorney General to finally and unilaterally disallow the claims, constitutes a gross miscarriage of justice. Petitioners are thus deprived of their concededly just claims without further recourse, are deprived of their statutory right of

review, and are deprived of a fair and impartial adjudication of their claims. Such a result is unconscionable.

Conclusion.

For the foregoing reasons, this petition for a writ of certiorari should be granted.

Respectfully submitted,

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Appendix A.

[Statutory Provisions Cited and Quoted].

Pertinent Part of Fifth Amendment to the Constitution of the United States of America.

ARTICLE V.

No person shall be * * * deprived of life, liberty, or property, without due process of law; * * *.

STATUTES.

Pertinent parts of the International Claims Settlement Act of 1949 as amended (64 Stat. 12, 22 U. S. C. 1621) and as further amended August 9, 1955 (69 Stat. 562, Public Law 285—84th Congress, c. 645, August 9, 1955)

SUBSECTION (a) OF SECTION 202 (22 U. S. C. 1631a (a)).

§1631a. *Property owned by Bulgaria, Hungary and Rumania or any national thereof—Vesting of property; liquidation; disposition of net proceeds.*

SEC. 202. (a) In accordance with article 25 of the treaty of peace with Bulgaria, article 29 of the treaty of peace with Hungary, and article 27 of the treaty of peace with Rumania, any property which was blocked in accordance with Executive Order 8389 of April 10, 1940, as amended, and remains blocked on August 9, 1955, and which, as of September 15, 1947, was owned directly or indirectly by Bulgaria, Hungary, and Rumania or by any national thereof as defined in such Executive order, shall vest in such officer or agency as the President may from time to time designate and shall vest when, as, and upon such terms as the President or his designee shall direct. Such property shall be sold or otherwise liquidated as expeditiously as possible after vesting under such rules and regulations as

the President or his designee may prescribe. The net proceeds remaining upon completion of the administration and liquidation thereof, including the adjudication of any suits or claims with respect thereto under sections 1631f and 1631g of this title, shall be covered into the Treasury. Notwithstanding the preceding provisions of this subsection, any such property determined by the President or his designee to be owned directly by a natural person shall not be vested under this subsection but shall remain blocked subject to release when, as, and upon such terms as the President or his designee may prescribe.

• • • • • •

SUBSECTION (b) OF SECTION 202 (22 U. S. C. 1631a (b)).

Net Proceeds of Property Vested in Alien Property Custodian or Attorney General.

(b) The net proceeds of any property which was vested in the Alien Property Custodian or the Attorney General after December 17, 1941, pursuant to the Trading With the Enemy Act, as amended, and which at the date of vesting was owned directly or indirectly by Bulgaria, Hungary, or Rumania, or any national thereof, shall after completion of the administration, liquidation, and disposition of such property pursuant to such Act, including the adjudication of any suits or claims with respect thereto under such Act, be covered into the Treasury, except that the net proceeds of any such property which the President or his designee shall determine was directly owned by a natural person at the date of vesting shall be divested by the President or such officer or agency as he may designate and carried in blocked accounts with the Treasury, bearing no interest, in the name of the owner thereof at the date of vesting, subject to release when, as, and upon such terms as the President or his designee may prescribe.

• • • • • •

SUBSECTION (a) OF SECTION 208 (22 U. S. C. 1631g (a))

§1631g. *Payment of debts—Claims allowable; defenses*

(a) Any property vested in the designee of the President pursuant to section 1631a (a) of this title, or the net proceeds thereof, shall be equitably applied by such designee in accordance with this section to the payment of debts owed by the person who owned such property immediately prior to its vesting in such designee. No debt claim shall be allowed under this section——

"(1) if it is asserted against Bulgaria, Hungary, or Rumania (including the government or any political subdivisions, agencies, or instrumentalities thereof); or

"(2) if it is based upon an obligation expressed or payable in any currency other than the currency of the United States; or

"(3) if it was not due and owing—

"(A) on October 9, 1940, in the event the property in respect of which such debt claim is filed was owned immediately prior to vesting by a national of Rumania;

"(B) on March 4, 1941, in the event the property in respect of which such debt claim is filed was owned immediately prior to vesting by a national of Bulgaria; or

"(C) on March 13, 1941, in the event that the property in respect of which such debt claim is filed was owned immediately prior to vesting by a national of Hungary.

SUBSECTION (b) OF SECTION 208 (22 U. S. C. 1631g (b)).

Time Limit for Filing Claims; Extensions; Notice.

(b) The designee of the President under this subchapter shall fix a date or dates after which the filing of debt claims in respect of any or all debtors shall be barred, and may extend the time so fixed, and shall give at least sixty days' notice thereof by publication in the Federal Register. . . .

SUBSECTION (c) OF SECTION 208 (22 U. S. C. 1631g (c)).

Examination of Claims; Finality of Determination.

(c) The designee shall examine the claims, and such evidence in respect thereof as may be presented to him or as he may introduce into the record, and shall make a determination, with respect to each claim, of allowance or disallowance, in whole or in part. The determination of the designee that a claim is within either paragraph (1) or (2) of subsection (a) of this section shall be final and shall not be subject to judicial review, and such claim shall not be considered a debt claim for any purpose under this section.

SUBSECTION (d) OF SECTION 208 (22 U. S. C. 1631g (d)).

Fund for Debt Payments.

(d) Payment of debt claims shall be made only out of such money included in, or received as net proceeds from the sale, use, or other disposition of, any property owned by the debtor immediately prior to its vesting in the designee of the President, as shall remain after deduction of (1) the amount of the expenses of the designee (including both expenses in connection with such property or proceeds

thereof, and such portion as the designee shall fix of his other expenses), and of taxes, as defined in section 1631k of this title, paid by the designee in respect of such property or proceeds; and (2) such amount, if any, as the designee may establish as a cash reserve for the future payment of such expenses and taxes. If the money available hereunder for the payment of debt claims against the debtor is insufficient for the satisfaction of all claims allowed by the designee, ratable payments shall be made in accordance with subsection (g) of this section to the extent permitted by the money available and additional payments shall be made whenever the designee shall determine that substantial further money has become available, through liquidation of any such property or otherwise. The designee shall not be required, through any judgment of any court, levy of execution, or otherwise, to sell or liquidate any property vested in him, for the purpose of paying or satisfying any debt claim.

* * * * * * *

SUBSECTION (f) OF SECTION 208 (22 U. S. C. 1631g (f)).

Schedule of Debt Claims Allowed; Notice, Review; Additional Evidence; Intervention; Judgment.

(f) If the aggregate of debt claims filed as prescribed exceeds the money from which, in accordance with subsection (d) of this section, payment may be made, the designee shall prepare and serve by registered mail on all claimants a schedule of all debt claims allowed and the proposed payment to each claimant. In preparing such schedule, the designee shall assign priorities in accordance with subsection (g) of this section. Within sixty days after the date of mailing of such schedule, any claimant considering himself aggrieved may file in the District Court of the United States for the District of Columbia a complaint for review of such schedule, naming the designee as defendant. A copy of such complaint shall be served upon the designee

and on each claimant named in the schedule. The designee, within forty-five days after service on him, shall certify and file in said court a transcript of the record of proceedings with respect to such schedule. Upon good cause shown such time may be extended by the court. Such record shall include the claims in question as filed, such evidence with respect thereto as may have been presented to the designee or introduced into the record by him, any findings or other determinations made by the designee with respect thereto, and the schedule prepared by the designee. The court may, in its discretion, take additional evidence, upon a showing that such evidence was offered to and excluded by the designee or could not reasonably have been adduced before him or was not available to him. Any interested debt claimant who has filed a claim with the designee pursuant to this section, upon timely application to the court, shall be permitted to intervene in such review proceedings. The court shall enter judgment affirming or modifying the schedule as prepared by the designee and directing payment, if any be found due, pursuant to the schedule as affirmed or modified and to the extent of the money from which, in accordance with subsection (d) of this section, payment may be made. Pending the decision of the court on such complaint for review, and pending final determination of any appeal from such decision, payment may be made only to an extent, if any, consistent with the contentions of all claimants for review.

. . . . . .

SUBCHAPTER III—CLAIMS AGAINST BULGARIA, HUNGARY RUMANIA, ITALY, AND THE SOVIET UNION [NEW]

Introductory Clause and Paragraph (8) of Section 301 (22 U. S. C. 1641).

§1641. *Definitions*

As used in this subchapter the term—

. . . . . .

(8) "Commission" means the Foreign Claims Settlement Commission of the United States, established pursuant to Reorganization Plan Numbered 1 of 1954 (68 Stat. 1279).

SECTION 303 (22 U. S. C. 1641b)

§1641b. *Claims of nationals of the United States; against Bulgaria, Hungary, and Rumania*

The Commission shall receive and determine in accordance with applicable substantive law, including international law, the validity and amounts of claims of nationals of the United States against the Governments of Bulgaria, Hungary, and Rumania, or any of them, * * * —

SECTION 306 (22 U. S. C. 1641e)

§1641e. *Time for filing of claims; notice*

Within sixty days after August 9, 1955, or within sixty days after the date of enactment of legislation making appropriations to the Commission for payment of administrative expenses incurred in carrying out its functions under this subchapter, whichever date is later, the Commission shall publish in the Federal Register the time when and the limit of time within which claims may be filed under this subchapter, which limit shall not be more than one year after such publication, except that with respect to claims under section 1641d of this title this limit shall not exceed six months. Mar. 10, 1950, c. 54, Title III, §306, as added Aug. 9, 1955, c. 645, §3, 69 Stat. 572.

Appendix B.

OPINIONS AND JUDGMENTS BELOW.

Opinion and Decision of District Court Judge Holtzoff (199 F. Supp. 256, R. 161).

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

Civil No. 578-61.

CHEMICAL BANK NEW YORK TRUST COMPANY

and

MANUFACTURERS TRUST COMPANY, Plaintiffs,

v.

ROBERT F. KENNEDY, Attorney General of the United States, Defendant.

Opinion.

BRACKLEY SHAW, of Washington, D. C., and A. HAYNE DEYAMPERT, of New York, for the plaintiffs.

WILLIAM H. ORRICK, JR., Assistant Attorney General, and ARMAND B. DUBOIS, Attorney, Department of Justice, both of Washington, D. C., for the defendant.

This action is brought by alleged creditors of the National Bank of Hungary, against the Attorney General of the United States, to secure payment of their indebtedness out of property seized by the Attorney General under the provisions of the International Claims Settlement Act, 22 U. S. C. § 1631 *et seq.* The matter is before the Court on cross-motions for summary judgment.

Certain property of the National Bank of Hungary was sequestered by the Attorney General on May 28, 1956, pursuant to the provisions of the above-mentioned statute, 22 U. S. C. §1631a. In brief, this provision of law authorized the seizure of any property belonging to Bulgaria, Hungary, or Rumania, or any national of any of these countries, which had been blocked during the War years and remained blocked as of August 9, 1955. At the time of the institution of this action, the sum of $168,158.07 was available in the account of the National Bank of Hungary in the Office of Alien Property of the Department of Justice.

The statute under which the seizure had been made further provided that the property vested thereunder in the designee of the President should be equitably applied to the payment of certain debts owed by its original owner and prescribed a procedure for filing, examination, and payment of such claims. An unsuccessful claimant was accorded the right of judicial review by a civil action in the United States District Court for the District of Columbia, 22 U. S. C. A. §1631g.

Pursuant to this statute, the plaintiffs filed claims with the Office of Alien Property of the Department of Justice, against the National Bank of Hungary, in the sums of $684,142.98 and $159,883.04. They were based on an alleged breach of contract, whereby it is asserted that the National Bank of Hungary undertook to repay to the plaintiffs certain advances made by them or their assignors to Hungarian exporters. The claims were rejected and this suit followed. The Government contends that there was no contract as between the plaintiffs or their assignors and the National Bank of Hungary; and that even if such a contract existed, impossibility of performance due to Hungarian law excused the failure to fulfill the obligation. The questions to be determined are: first, whether the alleged contract existed; and, if so, second, whether the refusal to carry out the commitment was justified.

The following is a brief summary of the transactions, which gave rise to the alleged contract. On December 19,

1928, the New York Trust Company, the plaintiff's predecessor and assignor, entered into a contract with eight Hungarian banks, by which the former agreed to make certain advances to enable Hungarian exporters to obtain payment in dollars for products exported from Hungary. By this agreement a self-liquidating revolving credit was created in the sum of five million dollars. The New York Trust Company on the one hand agreed to accept drafts in an aggregate sum not exceeding this amount; and on the other hand, the Hungarian Banks guaranteed the payment of the drafts. A number of American Banks participated with the New York Trust Company in this project. For some time the credit was extended, drafts were accepted in this country, and repayments were made by the Hungarian banks. In Hungary, the Hungarian Commercial Bank of Pest was the conduit through which remittances were transmitted to the New York Trust Company.

On August 25, 1931, the Hungarian National Bank wrote a letter to the Hungarian Commercial Bank of Pest, by which the former undertook to receive and keep in a separate account the repayments made by exporters and to use the fund thus created to meet the drafts previously discounted by the New York Trust Company.

On December 31, 1931, however, the National Bank of Hungary discontinued the payments. The New York Trust Company protested.

The contract on which the plaintiffs rely is contained in a letter from the National Bank of Hungary to the Hungarian Commercial Bank of Pest, dated August 25, 1931. By that instrument the National Bank of Hungary agreed to discount bills of exporters as against the five million dollar credit granted by the New York Trust Company. It was provided further that the bank was to receive repayments of advances from time to time. The letter then went on to state: "The amounts so delivered by the exporters will be kept in a separate account and will be used in the first line for payment of the bills discounted by the New York Trust Company in such a fashion that each claim will have to be legitimated by a certificate of the competent section

of the Royal Hungarian Ministry of Commerce taking over the agend*s* (sic) of the Royal Hungarian Ministry of Public Economy."

The foregoing statement clearly constituted a contractual undertaking to reimburse the New York Trust Company for the advances made by it in connection with the discounting of bills or drafts involved in this series of transactions. It is claimed in behalf of the Government that if this document constituted a contract, it was a contract with the Hungarian Commercial Bank of Pest, and not with the New York Trust Company. The plaintiffs urge, however, that the Hungarian Commercial Bank of Pest acted as agent of the New York Trust Company and, therefore, the contract was in effect made with the latter.

The plaintiffs' contention is well founded. The Hungarian Commercial Bank of Pest was the agency through which repayments were made by the National Bank of Hungary to the New York Trust Company. The Hungarian Commercial Bank of Pest acted as the agent of the New York Trust Company in receiving repayments in behalf of the latter. In fact, the National Bank of Hungary recognized the Hungarian Commercial Bank of Pest as the agent of the New York Trust Company, as appears by letter from the National Bank of Hungary to a Vice President of the New York Trust Company, of April 7, 1932, in which the writer explicitly referred to "your agent, the Commercial bank" (Transcript p. 40).

In this connection, it is important to observe that although on the oral argument, Government counsel contended that the Hungarian Commercial Bank of Pest was not the agent of the New York Trust Company, they had taken the contrary position in the memorandum previously filed in connection with the pending motions. In that memorandum Government counsel refer to the above mentioned letter as having been "written by the National Bank of Hungary as National Administrator of Foreign Exchange to the Hungarian Commercial Bank of Pest in Budapest, as *agent* for the New York Trust Company" (p. 13). The Court concludes that the Hungarian Commercial Bank of

Pest acted as agent of the New York Trust Company and that, therefore, the above-mentioned letter constituted a contract between the National Bank of Hungary and the New York Trust Company.

The second objection raised in behalf of the Government is that even if a contract existed between the National Bank of Hungary and the New York Trust Company, the performance of this obligation was rendered impossible by a change in the Hungarian law contained in the so-called "Moratorium Decrees." In the light of the conclusion about to be reached, it is unnecessary to pass on the question of law whether a change in the law of a foreign country may be deemed such an impossibility of performance as will excuse failure to fulfill a contractual obligation. Irrespective of that question, the objection raised by the Government on this aspect of the litigation is untenable for a number of reasons.

First, the Hungarian law has not been sufficiently or properly proved in this proceeding. The law of a foreign country, especially a country in which the common law does not prevail, is a matter of fact and has to be proven as a fact. Such proof may be adduced either by a certified or exemplified copy of the statutes and decrees of the foreign country, or by opinions of experts, or preferably both. No proper proof of the specific provisions of the Hungarian decrees, to which the Government referred, has been introduced and consequently the Court may not take notice of them.

Second, and what is more important, in repudiating its obligation and in notifying the Hungarian Commercial Bank of Pest, by letter of January 20, 1932, that it would discontinue further payments, the National Bank of Hungary did not rely on any legal prohibition or impossibility, or any change in the law of Hungary. It endeavored to justify its course by a change in economic conditions. Pertinent portions of this letter read as follows:

> "Answering your questions put in the matter of the exporteredit with the New York Trust Co., we

beg to inform you that we are unable to place at your disposal the foreign currencies required for the interest service and for the repayment of credits granted under the Hungarian Exportcredit Agreement, as this would offend the principle of equal treatment claimed with full right by the foreign creditors interested in shortterm loans of this country and especially by the American creditors.

"In view of the principle of equal treatment and the wellknown changes in economic conditions, we are sorry to inform you to be compelled to consider as null and void our letter of August 25, 1931, by which we have consented that the amounts of the maturing drafts be applied for to us and by which we have promised to handle the foreign currencies delivered by the exporters on a special deposit-account. Thus in the future the exporters utilizing this credit will have to deliver to our institution the foreign currencies resulting from their exports and are under existing regulations prohibited to utilize the foreign currencies for the purpose of repayment of their export credits."

By letter of April 7, 1932, the National Bank of Hungary wrote to the Vice President of the New York Trust Company, in a similar vein:

"Our assumption as regards the revolving employment of the amounts repaid under the credit, which was the principal preliminary condition to our letter of August 25th, not having been realised and the conditions which prevailed in the month of August, 1931, having changed considerably as the crisis deepened, the technical procedure we promised to follow had to be considered as frustrated for objective reasons."

On June 14, 1932, the National Bank of Hungary wrote to a Vice President of the New York Trust Company along the same line:

"At the outbreak of the crisis, as you certainly are aware of, the Hungarian Government, in order to protect not only the Hungarian economic life but also the interests of the foreign creditors, was forced to take two important restrictive measures.

"One of those measures consisted in making payments in foreign exchanges subject to the authorisation of the National Bank of Hungary. The Bank exercising this competence, even regardless of regulations contained in formal Standstill agreements, had to watch that the foreign exchange reserves shall be distributed under a reasonable scheme and had to care for maintaining an equal treatment of the foreign creditors. This consideration intended to serve the solidary interests of all creditors, has been realised, up to the end of last year, by not allotting foreign exchanges but for interest payments. The more as there were no foreign exchanges reserves to meet capital repayments.

"This has been the position at the end of last year when foreign exchanges reserves became so much depleted that they were insufficient to cover even interest payments.

"The other measure obliged exporters to surrender the equivalent in foreign exchanges of their exports. It was impossible to grant any exception to this rule as the country strongly wanted the full proceeds of exports, or else it would not have been possible to maintain, even to the extent as until the end of last year, the continuity of production and interest payments to foreign creditors.

"Those two measures as well as the foregoing had to be always considered by the Bank, already since the beginning of the restrictions."

This letter clearly indicates that the Bank had it within its power to make an exception in the matter and continue the payments, but that it felt that as a matter of policy it should not do so. Consequently any defense of impossibility of performance fails.

The Court reaches the conclusion in the light of the foregoing considerations, that a contract existed between the National Bank of Hungary and the plaintiffs' predecessors and assignors, and that the National Bank of Hungary was guilty of a breach in discontinuing performance of the agreement. Consequently, the claims of the plaintiffs against the fund held by the Attorney General are valid.

In this connection it may be observed that the purpose of seizing enemy property is not confiscation. Even in an era of total war, confiscation of enemy property is not sanctioned either by international law or practice. The principal purpose of such seizures is to sequester the property in order to make it impossible for the enemy to use it against this country in time of war. A secondary objective is to secure payment of claims of the United States and its nationals arising against the foreign Government or against the original owners of seized property.

Consequently no reason is perceived for being astute to find justification for a denial of claims of American nationals against such funds. Plaintiffs' claims are valid not only as a matter of law, but as a matter of morals as well. There is no doubt that the group of American banks extended credits to Hungarian exporters; that the National Bank of Hungary undertook to receive repayments and in turn to transmit them to the New York Trust Company; that in large part it failed to do so; and the American banks sustained large losses as a result of this repudiation.

The plaintiffs' motion for summary judgment is granted and the defendant's motion for summary judgment is denied.

ALEXANDER HOLTZOFF,
United States District Judge

November 27, 1961.

DISTRICT COURT JUDGMENT

(R. 169).

UNITED STATES DISTRICT COURT,

FOR THE DISTRICT OF COLUMBIA.

Civil Action No. 578-61.

CHEMICAL BANK OF NEW YORK TRUST COMPANY, 165 Broadway, New York 15, N. Y., and MANUFACTURERS TRUST COMPANY, 55 Broad Street, New York 15, N. Y.,

Plaintiffs,

against

ROBERT F. KENNEDY, Attorney General of the United States,

Defendant.

Plaintiffs, above named, having moved for summary judgment and defendant having cross moved for summary judgment, and said motions having been argued November 13, 1961, by A. Hayne deYampert, of counsel to plaintiffs and by Armand B. DuBois, of counsel to the defendant, and the Court having filed its decision and opinion dated November 27, 1961 granting plaintiffs' said motion and denying defendant's said cross motion;

Now, upon the pleadings, the record filed by the defendant as required by Sec. 208(f) of the International Claims Settlement Act of 1949, as amended, (par. (f) of Sec. 1631g of 22 U. S. C. A.), hereinafter called the Act, the moving affidavit of Donald E. Coyle, sworn to June 6, 1961; the affidavit of Viktor Bator, sworn to November 2, 1961; defendant's statement of material facts and the affidavit of Andrew Freeman, sworn to September 7, 1961, it is

ORDERED, that plaintiffs' motion for summary judgment be and the same is hereby granted; and it is further

ORDERED, that defendant's cross motion for summary judgment be and the same is hereby denied; and it is further

ORDERED, that the Final Schedule of the Office of Alien Property, dated December 29, 1960, a self-explanatory copy of which is annexed hereto marked Exhibit A and made a part hereof, disposing of claims filed pursuant to provisions of the Act, against the assets of National Bank of Hungary seized pursuant to provisions of said Act, be and the same hereby is reversed and modified to the extent that said Final Schedule shall allow the filed debt claims of plaintiff Chemical Bank New York Trust Company for $684,142.98, and of the plaintiff Manufacturers Trust Company for $159,883.04 against the $168,158.07, stated in said Final Schedule to be available for the payment of debt claims filed against the insolvent estate of National Bank of Hungary pursuant to said Act; and it is further

ORDERED AND ADJUDED that defendant, the designee of the President to exercise the President's powers under the hereinabove identified Act, through defendant's designee to exercise said power, the Assistant Attorney General in charge of the Civil Division as Director of the Office of Alien Property be and he hereby is directed to pay of said available $168,158.07, $136,305.72 to the plaintiff Chemical Bank New York Trust Company, and $31,852.35 thereof to the plaintiff, Manufacturers Trust Company.

Dated, December 6, 1961.

U. S. D. J.

No objection to form:

ARMAND B. DUBOIS,
Attorney for Defendant.

B-11

Court of Appeals Opinion.

(R. 172-174)

Opinion on Decision.

UNITED STATES COURT OF APPEALS.

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16987

ROBERT F. KENNEDY, Attorney General of the United States,

Appellant,

v.

CHEMICAL BANK NEW YORK TRUST COMPANY, et al.,

Appellees.

Appeal from the United States District Court for the District of Columbia

Decided May 2, 1963

MR. JOHN C. ELDRIDGE, Attorney, Department of Justice, with whom Acting Assistant Attorney General GUILFOYLE and MR. ALAN S. ROSENTHAL, Attorney, Department of Justice, were on the brief, for appellant.

MR. A. HAYNE DEYAMPERT, of the bar of the Court of Appeals of New York, *pro hac vice*, by special leave of court, with whom MR. BRACKLEY SHAW was on the brief, for appellees.

Before DANAHER, BURGER and WRIGHT, Circuit Judges.

BURGER, Circuit Judge: This appeal involves claims arising under the International Claims Settlement Act of 1949, as amended, 69 Stat. 562, 22 U. S. C. § 1631a, et seq.

On May 28, 1956, the Attorney General, acting under the authority of Executive Order No. 10644 (Nov. 7, 1955), vested the assets of the National Bank of Hungary. Chemical Bank New York Trust Company and Manufacturers Trust Company filed notices of debt claims with the Attorney General for $684,142.98 and $159,883.04, respectively. Section 208 of the International Claims Settlement Act, 22 U. S. C. §1631g. On December 22, 1960, the Director of the Office of Alien Property, with the approval of the Attorney General, disallowed the claims on the ground that there was no debt due and owing from the National Bank of Hungary to either of the claimants.

The claimant banks sought judicial review of the Attorney General's determination in the District Court pursuant to the provisions of Section 208(f) of the Act, 22 U. S. C. §1631g(f). On cross motions for summary judgment the District Court concluded that a contract existed between the National Bank of Hungary and the claimant banks and granted plaintiffs' motion for judgment and denied defendant's motion. 199 F. Supp. 256 (D. D. C. 1961). The Attorney General appealed.

Section 208(a) of the Act, 22 U. S. C. §1631g(a) provides:

> No debt claim shall be allowed under this section—
>
> (1) if it is asserted against * * * Hungary * * * (including the government or any political subdivisions, *agencies or instrumentalities* thereof) * * *. (Emphasis added.)

Section 208(c) of the Act provides that the Attorney General shall examine all claims in the first instance and determine if a particular claim falls within the terms of Section 208(a)(1), supra, and that this determination "shall be final and shall not be subject to judicial review." 22 U. S. C. §1631g(c). In this case the Attorney General made no finding with regard to the command of Section 208(a).

There was evidence before the Attorney General which indicated that the National Bank of Hungary provided pri-

vate banking services and performed monetary control functions for the Hungarian Government. If, at the time the claim was before him, the Attorney General had determined that the National Bank of Hungary came within the intendment of Section 208(a)(1), i.e., that it was an agency or instrumentality of the Hungarian government, that determination would now be final and not subject to judicial review. In a case such as this, an administrative finding that Section 208(a)(1) *does not apply* is the necessary predicate to review of the Attorney General's determination by the District Court. Congress has commanded in unmistakable terms that this determination is to be made by the administrator of the statute and not by the courts. However, since the Attorney General has never made the finding contemplated by the statute he must be allowed to determine, at this time, whether the claims asserted are barred by Section 208(a). If they are found to be claims of that category, the Act compels the Attorney General to disallow them and that determination is binding on the courts.

In the present posture of the case, we need not review the District Court's determination that a contract existed between the National Bank of Hungary and the claimants.

The judgment of the District Court is vacated and the case is remanded for further proceedings consistent with this opinion.

Reversed and remanded.

B-14

Court of Appeals Judgment.

(R. 175)

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 16,987

SEPTEMBER TERM, 1962

Civil 578-61

ROBERT F. KENNEDY, Attorney General of the United States,
Appellant,

v.

CHEMICAL BANK NEW YORK TRUST COMPANY, et al.,
Appellees.

Filed 5/2/63
Nathan J. Paulson
Clerk

Appeal from the United States District Court for the District of Columbia

Before: DANAHER, BURGER and WRIGHT, Circuit Judges

Judgment.

This cause came on to be heard on the record of appeal from the United States District Court for the District of Columbia and was argued by counsel.

ON CONSIDERATION WHEREOF it is Ordered and Adjudged by this Court that the judgment of the District Court appealed from in this cause be and it is hereby vacated, and that this cause be, and it is hereby remanded to the District Court for further proceedings consistent with the opinion of this Court.

Per Circuit Judge BURGER